STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RON SCHOLINK, Charging Party, v. SEIU-UNITED HEALTHCARE WORKERS WEST, Respondent.	Case No. SF-CO-221-M PERB Decision No. 2172-M March 1, 2011

Appearance: Ron Scholink, on his own behalf.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Ron Scholink (Scholink) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that SEIU-United Healthcare Workers West violated its duty of fair representation under the Meyers-Milias-Brown Act (MMBA)[1] when it executed a letter of understanding (LOU) with Scholink's employer, the Salinas Valley Memorial Healthcare System, that required cardiac sonographers, including Scholink, to obtain and maintain Pediatric Registry with the American Registry for Diagnostic Medical Sonography as a condition of continued employment. The Board agent dismissed the charge solely on the basis that it was not timely filed.

The Board has reviewed the dismissal and the record in light of Scholink's appeal and the relevant law. Based on this review, the Board finds the Board agent's warning and

[1] The MMBA is codified at Government Code section 3500 et seq.

dismissal letters to be a correct statement of the law and well-reasoned, and therefore adopts them as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

Scholink filed the instant unfair practice charge on March 9, 2010. The charge alleged that Scholink first learned of the execution of the LOU on September 8, 2009. The warning letter concluded that the charge was untimely because March 8, 2010 was the last day of the six-month statute of limitations period.

Scholink filed an amended charge that alleged he heard from an unnamed management employee on September 10, 2009 "that an agreement was made where I would need to pass the pediatric registry exam."[2] The amended charge also included the original allegation that Scholink first learned of the LOU on September 8, 2009. Finding that the amended charge failed to cure the timeliness defect, the Board agent dismissed the charge.

On appeal, Scholink claims that the September 8, 2009 date in the original charge was incorrect and that he actually learned of the LOU for the first time on September 10, 2009. However, nowhere in the amended charge did Scholink indicate that he was correcting an erroneous date in the original charge. Because Scholink had sufficient opportunity to correct his purported mistake before the charge was dismissed, we find no good cause to consider this claim on appeal. (See PERB Reg. 32635(b);[3] *Regents of the University of California* (2006) PERB Decision No. 1851-H ["The purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first

[2] The amended charge actually gave the date as September 10, 2010, but the attached documentation shows that the relevant events took place in 2009.

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32635(b) states: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence."

instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case."].)

ORDER

The unfair practice charge in Case No. SF-CO-221-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

April 22, 2010

Ron Scholink

Re: *Ron Scholink v. SEIU-United Healthcare Workers West*
Unfair Practice Charge No. SF-CO-221-M
DISMISSAL LETTER

Dear Mr. Scholink:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 9, 2010. Ron Scholink (Mr. Scholink or Charging Party) alleges that SEIU-United Healthcare Workers West (SEIU or Respondent) violated the Meyers-Milias-Brown Act (MMBA)[1] by breaching the duty of fair representation.

Charging Party was informed in the attached Warning Letter dated March 30, 2010, that the above-referenced charge did not state a prima facie case. More specifically, you were informed that the charge was filed outside the applicable six-month limitations period, and thus must be dismissed as untimely filed. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to April 8, 2010, the charge would be dismissed.

On April 6, 2010, Charging Party filed a First Amended Charge. However, in the First Amended Charge, Charging Party still asserts, in relevant part, that he was first informed of SEIU's agreement to a Letter of Understanding (LOU) with the Salinas Valley Memorial Hospital concerning an exam requirement on September 8, 2009.[2] As explained more fully in the Warning Letter, it is this factual allegation that formed the basis for the conclusion that the charge was untimely filed.

Mr. Scholink also includes the following in his First Amended Charge, stating verbatim as follows:

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found on the Internet at www.perb.ca.gov.

[2] SEIU's agreement to the LOU, without input from affected employees, is the central issue in Mr. Scholink's unfair practice charge.

> On Sept. 10, 2010[3] I was told in passing by management that an agreement was made where I would need to pass the pediatric registry exam. At the I didn't realize the ramifications of this or that LOU's were made. After further investigation I asked about this LOU which made it an official agreement between the union and svmh. From the correspondence from Ann Kern on Sept. 16, 2010 – I realized the full impact of this WRITTEN agreement between management and 2 stewards who have no knowledge or background of what I do professionally. I was purposely kept out of this meeting, even though I was a steward and the expert in my field, because of previous interaction with Ms Nunez and Ms Benson in regards on how the union could improve. This was done in retaliation – by making secret agreements with management with no input from me.

The above-quoted passage from the statement of the First Amended Charge appears to constitute an attempt by Charging Party to argue that the knowledge he acquired on September 8, 2009 should not render the charge untimely filed. Charging Party appears to assert that, because he later acquired additional information about the agreement, it was only after September 8, 2009 that he understood the effects or legal significance of the LOU. However, the Board has long held that a charging party's failure to understand the legal significance of actions until later does not excuse an otherwise untimely filing. (*Davis Teachers Association, CTA/NEA (Heffner)* (1995) PERB Order No. Ad-270; see, also, *Orange County Fire Authority* (2008) PERB Decision No. 1968-M and *County of San Diego (Health & Human Services)* (2009) PERB Decision No. 2042-M.)

Further, as noted in the Warning Letter, PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The requirement to establish the timeliness of a charge cannot be waived by the Board. (*Davis Teachers Association, CTA/NEA (Heffner)*, *supra*, PERB Order No. Ad-270.)

Therefore, the charge is hereby dismissed based on the facts and reasons set forth above, as well as in the March 30, 2010 Warning Letter.

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[3] From the context, it appears that the dates referenced in this paragraph are in 2009 rather than 2010.

Right to Appeal

Pursuant to PERB Regulations,[4] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

[4] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Les Chisholm
Division Chief

Attachment

cc: Vincent Harrington, Jr.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

March 30, 2010

Ron Scholink

Re: *Ron Scholink v. SEIU-United Healthcare Workers West*
Unfair Practice Charge No. SF-CO-221-M
WARNING LETTER

Dear Mr. Scholink:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 9, 2010. Ron Scholink (Mr. Scholink or Charging Party) alleges that SEIU-United Healthcare Workers West (SEIU or Respondent) violated the Ralph C. Dills Act (Dills Act).[1]

Mr. Scholink is employed by the Salinas Valley Memorial Hospital (Hospital) as an "echo tech," in a bargaining unit exclusively represented by SEIU. According to PERB records, the Hospital is a local "public agency" as defined in Government Code section 3501(c).[2] Accordingly, Mr. Scholink is a "public employee" as defined in Government Code section 3501(d), and the instant charge is appropriately analyzed pursuant to the provisions of the Meyers-Milias-Brown Act (MMBA),[3] rather than the Dills Act, as it is the MMBA that provides collective bargaining rights to employees of local public agencies.

In his charge, Mr. Scholink alleges that SEIU failed to fairly represent him when, in August 2009, SEIU entered into a Letter of Understanding (LOU) with the Hospital that requires certain employees, including Mr. Scholink, to pass an initial examination and satisfy ongoing requirements in order to maintain Pediatrics Registry with the American Registry for Diagnostic Medical Sonography. Mr. Scholink further alleges that this LOU was entered into without the prior knowledge of or input from the affected employees, despite the fact that Mr.

[1] The Dills Act is codified at Government Code section 3512 et seq. The Dills Act provides collective bargaining rights to "state employees," as defined in Government Code section 3513(c).

[2] PERB is currently conducting a decertification election involving the Hospital and SEIU in PERB Case No. SF-DP-294-M.

[3] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Scholink serves as an SEIU steward and had expressed concern in the past to SEIU representatives about such requirements being imposed.

Thus, the charge is properly considered as an allegation that SEIU breached its duty of fair representation.[4] While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.)

However, a charging party's burden includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

In *Saddleback Valley Unified School District* (1985) PERB Decision No. 558, the Board held that the six-month statute of limitations period provided by the Educational Employment Relations Act (EERA)[5] "is to be computed by excluding the day the alleged misconduct took place and including the last day." Thus, where the school employer adopted a proposal on June 20, 1984, the Board calculated that "the six-month period started on June 21, 1984, the day after the school board adopted the proposal, and ended at the close of business on December 20, 1984." (*Ibid.*; see also *California State University, Fullerton* (1986) PERB Decision No. 605-H.) The same method of calculation should be applied to the statute of limitations under the MMBA.[6]

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[4] Where a charging party fails to allege that any specific section of the Government Code has been violated, a Board agent, upon a review of the charge, may determine under what legal theory the charge should be analyzed. (*Los Banos Unified School District* (2007) PERB Decision No. 1935.)

[5] EERA, found at Government Code section 3540 et sq., provides for collective bargaining rights of public school employees.

[6] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

As noted earlier, the instant charge was filed on March 9, 2010.[7] In his statement of the charge, Mr. Scholink specifically alleges that he acquired knowledge of the August 2009 LOU on September 8, 2009. Based on these facts, the six-month limitation period extended from September 9, 2009 through and including March 8, 2010. Thus, the charge is filed beyond the applicable six-month limitation period and PERB lacks authority to issue a complaint in this matter.

For these reasons the charge, as presently written, does not state a prima facie case.[8] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before April 8, 2010, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Division Chief

[7] A document is "filed" on the date the document is **actually received** by PERB. (PERB Regulation 32135.)

[8] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)